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No. 08-1021

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

GILEAD SCIENCES, INC., JOHN C. MARTIN, JOHN F. MILLIGAN, MARK L. PERRY, NORBERT W. BISCHOFBERGER, ANTHONY CARRACIOLO AND WILLIAM A. LEE,

Petitioners,

v.

TRENT ST. CLARE AND TERRY JOHNSON, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' SUPPLEMENTAL BRIEF

DAVID J. GEORGE
ROBERT J. ROBBINS
COUGHLIN STOIA GELLER RUDMAN & ROBBINS LLP
120 East Palmetto Park Road
Suite 500
Boca Raton, FL 33432
(561) 750-3000

SANFORD SVETCOV
SUSAN K. ALEXANDER
Counsel of Record
COUGHLIN STOIA GELLER RUDMAN & ROBBINS LLP
100 Pine Street, Suite 2600
San Francisco, CA 94111
(415) 288-4545

Counsel for Respondents

[Additional counsel appear on signature page.]

April 15, 2009

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RESPONDENTS' SUPPLEMENTAL BRIEF

Underscoring the lack of any split among the circuits on the pleading standard for loss causation, the Fifth Circuit issued a published opinion on April 9, 2009, citing the Ninth Circuit's loss causation decision in this case with approval. *Lormand v. US Unwired, Inc.*, No. 07-30106, __ F.3d __, 2009 U.S. App. LEXIS 7452 (5th Cir. Apr. 9, 2009).

Initially, the Fifth Circuit followed this Court's guidance in *Dura Pharms., Inc. v. Broudo*, 544 U.S.

336 (2005), holding that "for a plaintiff's complaint to adequately *allege* or *plead* [loss causation], it need only set forth 'a short and plain statement of the claim showing that the pleader is entitled to relief,' pursuant to Federal Rules of Civil Procedure 8(a)(2)." *Lormand*, 2009 U.S. App. LEXIS 7452, at *77, emphasis in original. Thus, Petitioners' assertion (Reply 2, 4-5) that the Fifth Circuit applies Rule 9(b) to loss causation allegations is simply wrong. Petitioners' reliance on one word in an earlier unpublished decision by the Fifth Circuit (Pet. 17) never established a split among the circuits. *Lormand* clarifies that no split exists; the Fifth Circuit applies Rule 8 to loss causation pleading.

More specifically, the Fifth Circuit agreed with the Ninth Circuit that, reading *Dura* and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), together, "Rule 8(a)(2) requires the plaintiff to allege, in respect to loss causation, a *facially 'plausible' causal relationship* between the fraudulent statements or omissions and plaintiff's economic loss . . . [and] *enough facts* to give rise to a reasonable hope or expectation that discovery will reveal evidence of the foregoing elements of loss causation." *Lormand*, 2009 U.S. App. LEXIS 7452, at *84.[1] The Fifth Circuit's language mirrors the standard articulated by the Ninth Circuit: "sufficient detail to give defendants ample notice of [Investors'] *loss causation theory*, and to give us some assurance that the theory has a *basis in fact*." *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1056 (9th Cir. 2008). Like the Ninth Circuit–and every other circuit that has reached the issue–the Fifth Circuit requires a plausible theory and some supporting facts.

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[1] Emphasis added unless otherwise noted.

Moreover, like the Ninth Circuit, the Fifth Circuit held that a plaintiff adequately pleads loss causation by *alleging* that the fraud "caused a *significant part* of the depreciation of the stock and plaintiff's economic loss." *Lormand*, 2009 U.S. App. LEXIS 7452, at *84. Indeed, as though it were responding to Petitioners' here, *Lormand* rejected defendants' assertion there that "a more plausible alternate inference may be drawn as to the proximate cause of all of the plaintiff's economic loss." *Id.* at *109. Echoing the Ninth Circuit, the Fifth Circuit explained that "under Rules 8(a)(2) and 12(b)(6), at the pleading stage, the plaintiff is only required to plead a plausible cause of action; [the court] is not authorized or required to determine whether the plaintiff's plausible inference of loss causation is equally or more plausible than other competing inferences. . . ." *Id.* Petitioners' assertion that circuits are split regarding whether apportionment of loss must be *alleged* at the pleading stage–an assertion they attempt to support with a decision at the *proof* stage from the Fifth Circuit (Reply 6 n.4)–does not survive the Fifth Circuit's disposition of this issue.

The Fifth Circuit further agreed with the Ninth Circuit that the "timing issue" of the market's response to certain partial disclosures by defendants "is a factual question, and is not enough to dismiss a complaint that *alleges* a specific causal link. . . ." *Lormand*, 2009 U.S. App. LEXIS 7452, at *111 n.33 (citing *Gilead*, 536 F.3d at 1058), emphasis in original. The court held that loss causation allegations must be considered "in the context of all facts alleged by the complaint." *Id.* at *105. Thus, *Lormand* rejected defendants' fact-bound assertions that the stock price did not respond to a particular disclosure during the class period, concluding that loss causation was

amply pled where "plaintiff alleges that the stock dropped after the last disclosure in the series of disclosure events." *Id.* at *111 n.33.

The Fifth Circuit's holding responds directly to the assertion by Former SEC Commissioners and Officials and Law and Finance Professors that the "timing issue" between the FDA's issuance of a Warning Letter to Gilead, criticizing its off-label marketing practice, and the stock price drop two months later somehow vitiates the concept of market efficiency. SEC Commissioners' *Amicus Curiae* Brief 8. Thus, the Fifth Circuit's analysis in *Lormand* is consistent with the Ninth Circuit's recognition here that the content of the FDA letter *was* incorporated into the stock price, "but it did not contain enough information to significantly undermine Gilead's July 2003 pronouncements concerning demand for Viread." *Gilead*, 536 F.3d at 1058. The market responded "immediately after" the economic *impact* of Gilead's off-label marketing on earnings was revealed. *Id.* As both the Ninth Circuit and the Fifth Circuit recognized, any rule precluding recovery by injured investors in such circumstances would simply reward defendants crafty enough to make partial disclosures–or reveal half truths.

CONCLUSION

The circuits are in harmony. There is no reason for this Court to grant certiorari.

Respectfully submitted,

DAVID J. GEORGE
ROBERT J. ROBBINS
COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
120 East Palmetto Park Road
Suite 500
Boca Raton, FL 33432
(561) 750-3000

SANFORD SVETCOV
SUSAN K. ALEXANDER
Counsel of Record
COUGHLIN STOIA GELLER
RUDMAN & ROBBINS LLP
100 Pine Street, Suite 2600
San Francisco, CA 94111
(415) 288-4545

JOSHUA H. VINIK
LORI G. FELDMAN
ROSS B. BROOKS
MILBERG LLP
One Pennsylvania Plaza
New York, NY 10119
(212) 594-5300

Counsel for Respondents

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